UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/515
27 May 1991

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 515

Case No. 555: KHAN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Arnold Kean;

Whereas, at the request of Mohammed Akbar Khan, a former staff member of the United Nations specifically recruited for the United Nations Children's Fund (UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 20 July 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 19 May 1990, the Applicant filed an application containing the following pleas:

"II. Pleas

(a) UNICEF Acting Executive Director's decision of dismissal of my service from UNICEF, contained in his letter dated 18 May 1989 (...), be ordered to be withdrawn and I be reinstated in my service in UNICEF from the date of dismissal.

(b) UN Joint Appeals Board's decision to make no recommendations in support of my appeal, contained in their report No. 768, case No. 89-35 dated 9 February 1990, and approved on behalf of the UN Secretary-General (...) by the Acting Under-Secretary-General for Administration and Management on 20 February 1990, be declared as null and void.

(c) The UN Secretary-General's decision to maintain the contested decision, contained in the letter dated 20 February 1990, from the Acting Under-Secretary-General for Administration and Management to me (...) be ordered to be withdrawn.

(d) US$50,000 be ordered to be paid to me by the UNICEF for damaging my reputation within and outside the office and causing financial hardship and mental torches [sic] during the period of dismissal."

Whereas the Respondent filed his answer on 21 December 1990;

Whereas the Applicant filed written observations on 30 April 1991;

Whereas, on 14 May 1991, the Tribunal put questions to the Respondent;

Whereas, on 16 May 1991, the Respondent submitted his answers to the Tribunal's questions;

Whereas, on 20 May 1991, the Applicant commented upon the Respondent's answers of 16 May 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the Organization on 8 December 1976, as a Steno-Secretary at the GS-4 level in the UNICEF Office in Islamabad, Pakistan. During the course of his employment with the Organization, he was granted a probationary appointment on 1 April 1979 and a permanent appointment on 1 October 1979. In January 1980, he was promoted to the GS-6 level and his functional title was changed to Supply Assistant/ Senior Secretary. He served in this capacity until 22 May 1989, the date of his dismissal for misconduct.

In August 1987, at the request of the Officer-in-Charge of the UNICEF Office in Islamabad, UNICEF's Regional Auditor visited the Islamabad Office to "assess ... the situation of local procurement practices at the Office". The Chief, Supply and Programme Operations Section, had informed the Officer-in-Charge that he suspected UNICEF was being defrauded by submission of tenders by non-existent firms.

In a draft report dated 27 August 1987, to the Officer-in-Charge, Islamabad Office, the Regional Auditor concluded that "there [was] sufficient evidence on hand to warrant both a management decision on staffing and a thorough review of prior procurement activities from the Islamabad Office."

In October 1987, the UNICEF Office in Islamabad hired a consultant to undertake a review of local procurement practices. He conducted his enquiry from 29 October to 10 December 1987, and submitted a report in April 1988, concluding, inter alia, that certain staff had performed their duties either with intent to defraud the Organization and/or with such incompetence or neglect as to be judged equally culpable.

On 18 August 1988, the UNICEF Representative transmitted relevant excerpts of the consultant's report to the Applicant for comments. In a memorandum dated 18 September 1988, the Applicant submitted comments on the consultant's report. The Applicant argued essentially that the investigation had not been carried out "impartially/independently" and that an "attempt [had] been made to prove" that he was "solely responsible for local procurement", absolving the Chief of Section of any responsibility, when in fact, being junior in rank, the Applicant was not supposed to take any action independently from the Chief. The Applicant also submitted detailed comments on all the observations made by the consultant.

On 15 November 1988, the UNICEF Representative established an Ad hoc Advisory Committee on Local Procurement in Pakistan (the Ad hoc Committee) to advise whether there were grounds for attributing to any UNICEF staff involved in the procurement of supplies and equipment in Pakistan, acts of misconduct which could trigger disciplinary procedures or an assessment of performance incompatible with the highest standards of efficiency and competence required by the UN Charter. The Committee was also asked to recommend personnel and management actions to be taken with a view to improving local procurement procedures.

In a report dated 26 November 1988, the Ad hoc Committee found instances of fraud in the bidding process that could not have succeeded unless a staff member within UNICEF had facilitated their execution. As regards the Applicant, the Committee concluded that from a series of "verifiable facts" and from "the pattern of events" described in a number of procurement cases, the Applicant "participated with suppliers to defraud UNICEF by manipulating the bidding process, in such a way that one particular supplier fraudulently wins the bid. The Committee believes that a case of misconduct may be established against Mr. Akbar Khan".

On 27 December 1988, the UNICEF Representative in Islamabad transmitted to the Applicant a copy of the Ad hoc Committee's report. He informed him of the Committee's conclusion that he had participated with suppliers to defraud UNICEF and stated that before reaching any final conclusion, he would consider his comments on the charges pursuant to UNICEF Administrative Instruction 264 of 3 March 1976. Pending the outcome of the disciplinary proceedings, he decided to suspend the Applicant from duty with full pay.

On 15 January 1989, the Applicant submitted his comments on the Ad hoc Committee's report.

On 15 April 1989, the UNICEF Representative submitted his report, dated 20 March 1989, and addressed to the Director, Division of Personnel, concerning the disciplinary proceedings.

On 18 May 1989, the Acting Executive Director of UNICEF informed the Applicant of her decision to dismiss the Applicant for misconduct from UNICEF service, under staff regulation 10.2, on the ground that he had "for personal reasons, facilitated acts of fraud by outside suppliers, resulting in depriving UNICEF of honest and competitive bidding process". He was informed that he would "receive payment of three months in lieu of notice" but no termination indemnity.

On 15 June 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 9 February 1990. Its conclusions and recommendation read as follows:

"Conclusions and Recommendation

44. The Panel unanimously

1. Finds that the decision of the UNICEF Executive Director to dismiss the appellant for misconduct for facilitating 'acts of fraud by outside suppliers, resulting in depriving UNICEF of honest and competitive bidding process' was justified on the basis of the available conclusive evidence,

2. Finds that the appellant's procedural rights to due process had been duly observed,

3. Finds that the appellant has produced no convincing evidence that the procedure against

him and the decision by the UNICEF Executive Director had been tainted by prejudice or by some improper motive.

45. Therefore, the Panel unanimously decides to make no recommendation in support of the appeal."

On 20 February 1990, the Acting Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General, having re-examined his case in the light of the Board's report, had decided to maintain the decision to dismiss him and to take no further action in the case.

On 19 May 1990, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to dismiss the Applicant was tainted with prejudice and extraneous considerations.

2. The Applicant acted under the direction of the Chief of the UNICEF Supply Section and thus had no authority to sign by himself any documents concerning local procurement.

3. The composition of the Ad hoc Committee was deficient in that it did not include staff representatives in accordance with UNICEF Administrative Instruction 264 of 3 March 1976.

4. Fraud has not been positively proven and if any doubt exists as to the Applicant's participation in fraud it should benefit him.

5. The Applicant was not provided with a copy of the audit report on local procurement and did not have an opportunity to comment thereon.

6. The Applicant was not provided with counsel in the JAB proceeding.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant was properly taken and fully respected the Applicant's rights to due process.

2. The decision to dismiss the Applicant was not improperly motivated nor was it tainted by prejudice or other extraneous considerations.

3. The Ad hoc Committee was properly constituted.

The Tribunal, having deliberated from 14 to 27 May 1991, now pronounces the following judgement:

I. The Applicant appeals against the Secretary-General's final decision maintaining the UNICEF Acting Executive Director's decision to dismiss the Applicant under staff regulation 10.2.

The impugned decision results from charges that the Applicant had facilitated acts of fraud by outside suppliers, thus depriving UNICEF of an honest and competitive bidding process. The Respondent determined that such actions by the Applicant constituted serious misconduct unbefitting an international civil servant and warranting dismissal.

II. It is useful to recall here the consistent jurisprudence of the Tribunal pertinent to this case:

1. The Respondent has broad discretion with regard to disciplinary matters, and this includes determination of what constitutes serious misconduct as well as the appropriate disciplinary action.

2. However, the Tribunal is competent to review the Respondent's decision if it is vitiated by lack of due process or by a mistake of fact or law, or is arbitrary or motivated by prejudice or by other extraneous factors.

III. The Applicant contests the Respondent's decision on a number of grounds, which if valid would constitute mistakes of fact, violations of due process or vitiating prejudice or extraneous considerations. The Tribunal will therefore examine each of the Applicant's arguments in this regard.

IV. The Applicant asserts his innocence by denying the fact on which his alleged involvement in the fraud is based and invokes a number of arguments to substantiate his assertion. In particular, the Applicant contends that the decision to dismiss him was based on assumptions, opinions and doubts, but not on proven facts.

V. The Tribunal is unable to accept this contention for two reasons. The first is that the Respondent's accusations against the Applicant were not made lightly or based on an isolated incident of an irregular tender. They were the result of a particular pattern of events spread over almost four years during which the UNICEF Administration engaged in tedious and sometimes frustrating efforts at enquiry, investigation and interviews with the Applicant and others concerned in order to arrive at the truth in a local environment which had its own difficulties.

VI. Secondly, the Tribunal observes that these efforts were made not by one, but by different and separate persons, including:

(a) A Regional Internal Auditor;

(b) An external consultant hired to conduct an inquiry into local processes and procedures;

(c) The members of the Ad hoc Advisory Committee.

The Ad hoc Committee was empowered to advise the UNICEF Representative in Pakistan on whether there were grounds for attributing to any UNICEF staff involved in the procurement of supplies and equipment acts of misconduct or performance which were incompatible with the highest standards of efficiency and competence called for by the UN Charter and the Staff Regulations and Rules. In its report, the Ad hoc Committee stated that it had interviewed all the staff members involved and, after analyzing a number of incidents, concluded as to the Applicant's culpability as follows ...:

> "it is clear ... that he participated with suppliers to defraud UNICEF by manipulating the bidding process, in such a way that one particular supplier fraudulently wins the bid. The Committee believes that a case of misconduct may be established against [the Applicant]."

VII. The Tribunal notes further that on 27 December 1988, the UNICEF Representative in Islamabad transmitted a copy of the report of the Ad hoc Committee to the Applicant, asked for his comments and on 15 January 1989, the Applicant presented a 19-page memorandum replying in detail to that report.

VIII. The Tribunal also notes that four months later, on 18 May 1989, the Acting Executive Director of UNICEF issued her decision to dismiss the Applicant after establishing that the evidence had been carefully assessed in the light of the Applicant's arguments and the conclusion had been reached that the Applicant had participated in the fraud.

IX. In his second argument to prove his innocence, the Applicant contends that he was under the direction and supervision of the Chief, Supply Section, and thus had no authority to sign by himself any documents concerning local procurement.

After consulting the range of assignments undertaken by the Applicant in the course of his service in the Supply Section, especially as reflected in Section II of his Performance Evaluation Report for 1987, the Tribunal notes that he had a substantial level of procurement responsibilities. Therefore, his argument in this regard does not stand.

X. The Applicant also claims he was singled out for disciplinary action while senior responsible officials were exonerated.

The Tribunal cannot accept this argument, because once the responsibility of a staff member for irregularities is duly established, the existence of others who might also be responsible does not relieve the officer of his own responsibility. In its Judgement No. 479, Caine (1990), paragraph III, the Tribunal stated:

> " ... Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them." (Emphasis added)

XI. The Applicant, moreover, attempts to refute the charge against him on the theory that it was necessary for the Respondent first to determine how much money was lost by UNICEF, or the extent of the reduction in the quality of goods it received, as a result of the fraud with which the Applicant was charged. In the Tribunal's view, the Respondent's determination, that the fraudulent manipulation of supply bids by the Applicant is in itself an act

of misconduct warranting dismissal, cannot be reviewed as long as it is within the bounds of the discretionary power recognized by the jurisprudence of the Tribunal.

XII. After reviewing the facts and evaluating the arguments of both parties, the Tribunal concurs with the Joint Appeals Board's (JAB) finding that the decision to dismiss the Applicant was based on conclusive evidence.

XIII. The Tribunal will now examine whether the decision was vitiated by lack of due process, as claimed by the Applicant. He advances several arguments in this regard:

In his first procedural argument, the Applicant claims that he was not provided with a copy of the audit report on local procurement and did not have an opportunity to comment thereon. The Tribunal notes the Respondent's explanation that this report was an initial one, mainly designed to evaluate the situation and to make recommendations to management regarding local procurement practices, and accordingly was not shown to the Applicant.

XIV. On the other hand, the Tribunal notes that the relevant parts of the consultant's report and the entire text of the Ad hoc Committee's report were communicated to the Applicant. He commented on these reports, on 18 September 1988 and 15 January 1989, respectively.

XV. When the Applicant kept complaining that relevant documents were not supplied to him, the Chief, UNICEF Personnel and Administration, Islamabad, in a memorandum of 18 April 1989, invited the Applicant to indicate in writing what other documents he might wish to consult. Moreover, the Applicant was invited to consult the tapes of his several interviews, but failed to avail himself of this opportunity.

XVI. The Tribunal finds that the Respondent did not fail to communicate or offer to the Applicant all the reports and documents that were pertinent to his involvement in the alleged fraudulent acts and were necessary to prepare his defence.

XVII. The Applicant also alleges that his right to due process was violated because the Ad hoc Committee was established without staff participation, contrary to UNICEF Headquarters Administrative Instruction No. 264 of 3 March 1976. According to staff rule 110.1, as applicable at that time, joint disciplinary committees with staff participation were established only at Headquarters and Geneva. For staff members serving at other offices, disciplinary measures could be applied by the Secretary-General without referral to such a joint committee, according to UNICEF Administrative Instruction 264.

As disciplinary committees established in offices away from Headquarters and Geneva did not at the time require staff participation, the composition of the Ad hoc Committee was valid under staff regulation 10.1. Accordingly, the Applicant's argument in this regard fails.

XVIII. The Applicant argues that his right to due process was violated by the JAB, because it did not thoroughly consider his appeal, and as an example alleges that the JAB failed to review or even to mention in its report the Applicant's rebuttal of the Ad hoc Committee's report. The Tribunal notes in this regard that the JAB's work in this case was facilitated by two circumstances:

First, the JAB was faced with a case in which the procedure outlined in UNICEF Administrative Instruction No. 264 had been scrupulously observed.

Second, the JAB had the benefit of reports on two long and extensive enquiries, during which the Applicant was at every stage properly informed and could fully exercise his right to state his case and to have his replies fully considered and evaluated. With regard to the Applicant's complaint concerning his rebuttal of 15 January 1989, the Tribunal finds that the JAB did not ignore this memorandum, the Board expressly mentioned it in paragraph 13 of its report and even quoted from it.

So the Applicant's argument that the JAB was superficial in handling his appeal has no merit.

XIX. The Applicant finally complains that he was denied the assistance of counsel during the proceedings of both the Ad hoc Committee and of the JAB.

XX. With regard to the proceedings of the Ad hoc Committee, the Tribunal notes that UNICEF Administrative Instruction No. 264, paragraph 2(b), provides that during the investigation process, the staff member may avail himself of the advice of another staff member of his choice, present at the same duty station, to assist him in his defence. The Tribunal also notes that when, on 27 December 1988, the UNICEF Representative in Islamabad transmitted a copy of the report of the Ad hoc Committee to the Applicant he was advised that he could avail himself of the assistance of any staff member of UNICEF in Islamabad who was willing to act as his counsel to assist him in preparing his reply. Therefore, it was the responsibility of the Applicant to enlist the services of a colleague of his choice to assist him. The Tribunal does not find in this case any fault in the Respondent's implementation of paragraph 2(b) of Administrative Instruction No. 264.

XXI. With regard to the issue of representation of the Applicant by counsel in the JAB proceedings, the Tribunal notes the following from the correspondence exchanged between the Secretary of the JAB and the Co-ordinator of the Panel of Counsel (the Co-ordinator). The Applicant, on 10 August 1989, requested the help of the Co-ordinator to secure him the services of Counsel. The Secretary of the JAB twice inquired, in December 1989 and January 1990, from the Co-ordinator about the selection of a counsel for the Applicant, since the Secretary intended to place the Applicant's case before the JAB late in January 1990. On 7 February 1990, the Co-ordinator informed the Secretary of the JAB that Mr. Adherata Keefe had agreed to represent the Applicant before the JAB as counsel. On the same day, the Secretary recorded in a Note for the File that the designated counsel had nothing to add and that the Applicant had been advised of the selection of the Counsel. The case thus being ready for submission to the JAB, it met on 8 February 1990, to consider the case.

The Tribunal finds that on that date, the JAB had not been informed by the counsel designated for the Applicant that counsel had not yet contacted his client. The JAB could therefore, in good faith, consider the Applicant's appeal, the written proceedings being complete. In any case, the Tribunal finds no prejudicial error on the part of the Respondent on this point.

XXII. In his observations on the Respondent's answer, counsel for the Applicant argues that there is a serious breach of due process, because

Applicant's application to the Tribunal was drafted without the assistance of counsel. The Tribunal notes that the Applicant was provided with two counsels before he presented his application to the Tribunal on 19 May 1990. Thus on 23 February 1990, the Applicant notified the Co-ordinator of his agreement to be represented by "Mr. B". Moreover, on 4 April 1990, the Applicant was informed by the Co-ordinator that a second counsel, Mr. Fayache, was ready to assist him in his case. Notwithstanding the appointment of these counsels, when the Applicant, on 19 May 1990, filed his appeal before the Tribunal, he noted in response to the question of designation of counsel: "I am myself presenting my case in writing". In these circumstances, the Tribunal finds no breach of due process, especially as Counsel for the Applicant submitted on his behalf observations on the Respondent's answer.

XXIII. The finding of the Tribunal is that the decision to dismiss the Applicant was not vitiated by any lack of due process.

XXIV. After reviewing all the facts, the Tribunal notes further that the Applicant has produced no convincing evidence that the decision to dismiss him had been motivated by prejudice or other extraneous considerations.

XXV. In view of the foregoing, the Tribunal finds that the decision to dismiss the Applicant on the ground of fraud was a valid exercise of the discretionary power of the Secretary-General under staff regulation 10.2, and rejects the application in its entirety.

(Signatures)

Roger PINTO
President

Ahmed OSMAN
Vice-President

Arnold KEAN
Member

Geneva, 27 May 1991

Paul C. SZASZ
Acting Executive Secretary